UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE MELVIN MURRAY and JOHNNIE CHARLES MURRAY, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	)	No. 22340

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

STATEMENTS OF FACTS AND PLEADINGS DISCLOSING JURISDICTION

The Court has jurisdiction to review the final judgment of conviction of each of the appellants of the offense of smuggling and concealing heroin in violation of 21 U.S.C. 173 and 21 U.S.C. 174 on the ground that 28 U.S.C. 1291 provides for appeal to the courts of appeals from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court. The trial in this matter, before the Honorable William P. Copple, Judge, was held without a jury in the United States District Court for the Southern District of California at San Diego on June 14, 1967. On June 15, 1967, Judge Copple

adjudged each appellant guilty "on both counts" (21 U.S.C. 173 and 21 U.S.C. 174). On the same date, appellants made a motion for a new trial and said motion was denied. On July 31, 1967, Judge Fred Kunzel ordered that each of the appellants be committed to the custody of the attorney general or his authorized representative for imprisonment for a period of seven years on the count alleging a violation of 21 U.S.C. 173 and seven years on the count alleging a violation of 21 U.S.C. 174. The seven-year sentences were to run concurrently. The indictment specified only a violation under 21 U.S.C. 174 (RT 2). On the same day, notice of appeal to the United States Court of Appeals for the Ninth Circuit was made by the appellants. On September 11, 1967, appellants were granted an extension of time to October 9, 1967, for filing the designation of documents pending the appeal. On September 29, 1967, said designation of documents on appeal was filed with the United States District Court.

STATEMENT OF THE CASE

Appellants' appeal the judgment of the conviction against them pursuant to a trial without jury resulting finally in a judgment of guilty and a sentence of imprisonment of each appellant for two terms of seven years, to run concurrently. Appellants' appeal is directed to the determination that each of them is guilty of the crimes of smuggling and concealing heroin in violation of 21 U.S.C. 173 and 21 U.S.C. 174. Appellants maintain that the District Court erred

in finding appellants guilty; that there was insufficient evidence to find appellants guilty; and that the District Court erred in failing to dismiss the indictment as to both appellants.

QUESTIONS PRESENTED

1. Does Count One of the indictment set forth a criminal offense?

2. Was appellants' act in failing to pay tax and register the contraband constitutionally protected?

3. Did any act of smuggling or importing occur?

4. Did appellant Johnnie Charles Murray know that he was attempting to bring a narcotic drug into the United States?

5. Did appellant Lonnie Melvin Murray have "possession" of the heroin so as to raise the presumption in the final paragraph of 21 U.S.C. 174?

SPECIFICATION OF ERRORS

1. Count One of the indictment is defective, and it was an error to enter a judgment of guilty based thereon.

2. The Court erred in failing to dismiss the indictments as to both appellants for the reason that payment of the required tax and registration necessary for legal importation would violate appellants' rights against self-incrimination.

3. As a matter of law, no act of smuggling or importing occurred, and the Court erred in failing to dismiss the indictment as to both appellants.

4. There was insufficient evidence to find appellant Johnnie Charles Murray guilty.

5. There was insufficient evidence to find appellant Lonnie Melvin Murray guilty.

ARGUMENT

Appellants, Johnnie Charles Murray and Lonnie Melvin Murray, are brothers who resided in San Francisco at the time of the alleged incident. On the morning of February 11, 1967, the appellants traveled from San Francisco to Los Angeles by airplane. Their stated purpose for going to Los Angeles was to visit their niece, nephew and a girl that Lonnie Melvin Murray was interested in. When they arrived in Los Angeles, at about 9 o'clock A.M., they contacted Albert Scott, known as Slim. Appellants borrowed a car from Albert Scott and drove to Mexico. Shortly before 8 o'clock P.M. on the same day, the appellants arrived at the port of entry in San Ysidro, California. At that time, driver, Lonnie, and the passenger, Johnnie, were questioned about their citizenship and asked what they had purchased in Mexico. They declared nothing. The United States customs inspector referred them for a secondary inspection. The inspector and another inspector escorted Lonnie into the search room, but found nothing. Then they escorted Johnnie into the search room and told him to empty everything out of his pockets, which he did, and then told him to remove his

coat. As he removed his coat, the customs inspector discovered two rubber contraceptives tied with string around the bicep of Johnnie's left arm. The contraceptives contained a substance that was later identified as heroin.

1. Based upon the foregoing facts, the appellants were arrested and charged with violation of 21 U.S.C. 173 and 21 U.S.C. 174. These sections of the law provide that the importation of narcotic drugs is prohibited, with certain exemptions. Section 173 does not set forth a penalty for such an offense. Section 174 sets forth a penalty for this offense and states what shall be deemed sufficient evidence to authorize a conviction. Both statutes refer to a single offense, and only one crime occurs from the violation thereof. Furthermore, section 173 simply requires the forfeiture of illegally imported narcotic drugs. Section 174 provides the criminal penalty. Therefore, it was an error by the district court to regard these two counts as setting forth separate and different offenses. Count One of the indictment as to each appellant does not allege a crime, and a conviction based thereon was in error. For this reason, it is respectfully submitted that as to each appellant, the conviction under Count One of the indictment be reversed.

2. The heroin was seized on the grounds that it was imported "contrary to law" as specified in 21 U.S.C. 174. In order to import heroin in conformity with the law, it would have been necessary for the importing person to pay the tax

due under 26 U.S.C. 4721 and register under 26 U.S.C. 4722. Such payment and registration would have confronted appellants, or one of them, with substantial hazards of incrimination. Marchetti vs. United States (Jan. 29, 1968) 88 S.Ct. 697. In this case, the reasoning of former cases that the privilege against self-incrimination does not apply to prospective acts was expressly overruled. The court states:

> "Substantial hazards of incrimination as to past or present acts plainly may stem from the requirements to register and to pay the occupational tax. * * * In the first place, satisfaction of those requirements increases the likelihood that any past or present gambling offense will be discovered and successfully prosecuted. * * * Further, the acquisition of a federal gambling tax stamp, * * *, obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes" (88 S.Ct. 705).

The Chief Justice, in his dissent, specifically includes registration under 26 U.S.C. 4722 (narcotics) and 26 U.S.C. 4753 (marijuana) as Federal statutes subject to attack (88 S.Ct. 716, 721).

This doctrine was clearly extended to importation of physical objects and possession of physical objects in Haynes vs. United States (Jan. 29, 1968) 88 S.Ct. 722. Defendant was charged with violation 26 U.S.C. 5851 of knowingly possessing a firearm which had not been registered with the Secretary of the Treasury as required by 26 U.S.C. 5841. A registration requirement, being directed at persons inherently suspected of criminal activities, gives rise to real and substantial hazards of self-incrimination. Importers and

manufacturers and dealers of proscribed firearms are obliged each year to pay special taxes. The court reversed defendant's conviction on the ground that the registration requirements violated defendant's constitutional privilege against self-incrimination.

If Johnnie and Lonnie had disclosed the existence of the heroin for purposes of paying the tax (assuming one or both of them knew there was heroin to report), they would have exposed themselves to prosecution for possession of the narcotic. So the requirement that they register the material before bringing it into the United States would have required them to incriminate themselves. Therefore, their failure to comply with the requirements of 26 U.S.C. 4751 and 26 U.S.C. 4722 was not unlawful, and the heroin was not imported "contrary to law" as specified in 21 U.S.C. 174.

3(a). The appellants were in a vehicle at the border crossing when the incident took place. They are charged with the offense of smuggling a narcotic drug into the United States. Nowhere in 21 U.S.C. 173 or 21 U.S.C. 174 is an offense of attempting smuggling set forth. It has been the law of the United States since 1899 that attempts to smuggle are not smuggling. In Keck vs. United States (1899) 172 U.S. 434, 19 S.Ct. 254, 43 L.Ed. 505, the United States Supreme Court carefully and exactly defined the term "smuggling." The facts of that case were that the captain of a vessel had in his cabin some diamonds he intended to send to a diamond company

in Cincinnati, Ohio, without the payment of the necessary duty. The ship entered American waters and was approaching the moorings at the harbor in Philadelphia when an agent of the Treasury Department boarded the ship. After a conversation with the captain, the Treasury Department agent asked the captain to get the diamonds. The captain did so. The captain was then charged with smuggling and the court states that there was no passage of the packages of diamonds through the lines of custom authorities, but on the contrary the packages were delivered to the customs officer on board the vessel itself, at a time when or before the obligation to make entry and pay the duties arose. For this reason, the offense of smuggling was not committed.

This case was discussed in Ortez vs. United States (5 Cir. 1964) 329 F.2d 381. In that case, the court held that the Keck case was not controlling in a marijuana smuggling case because the tax due under 26 U.S.C. 4751 and the registration required under 26 U.S.C. 4753 must be paid before the importation, and the duty due on the diamonds was to be paid at the time of importation. The distinction on a rationale related to Federal taxing statutes which seek to locate activity or physical objects in order to expose criminal activity are no longer valid. (See Marchetti vs. United States, supra; Grosso vs. United States (Jan. 29, 1968) 88 S.Ct. 709; and Haynes vs. United States, supra.)

3(b). This Court in Wong Bing Nung vs. United States (9 Cir. 1955) 221 F.2d 917, following Keck vs. United States, supra, reversed a judgment of conviction based upon a charge of smuggling wherein Wong's goods were seized aboard a ship in the harbor. As a part of that decision, this Court recognized the reasoning in United States vs. Merrell (2 Cir. 1934) 73 F.2d 49 and Gillespie vs. United States (2 Cir. 1926) 13 F.2d 736. The distinction set forth in those cases is that "imports contrary law" is distinguished from "smuggling" when the defendants are not charged with having smuggled the goods, but are charged with having facilitated the transportation of the goods after they have been smuggled and with the knowledge that they had been brought into the country contrary to law. The defendants in Gillespie vs. United States, supra, were arrested after the smuggled goods had been taken from a ship and were lying on the dock or had been carried away by automobiles. In United States vs. Merrell, supra, the court reversed the judgment as to smuggling and affirmed on the facilitation charge of the transportation of smuggled merchandise after importation.

The first occasion upon which a person may present narcotic durgs for purposes of bringing them through the United States is at the border. At this point, the customs officer received the contraband. At most, the evidence shows an attempt to import or smuggle a narcotic drug into the

United States. In this case there was no importation and therefore the crime of facilitating transportation of imported heroin was not committed. This is a true attempted smuggling case. For this reason, it is respectfully submitted that the convictions of both appellants be reversed and set aside as to all counts.

4. There are four elements of the crime as set forth in 21 U.S.C. 174:

1. Doing one of the physical acts limned in the statute,

2. Doing such an act "fraudulently or knowingly,"

3. The illegal importation of the narcotic drug, and

4. Knowledge of the illegal importation.

The final paragraph of section 174 makes possession of the narcotic drugs sufficient evidence as to all four elements "unless the defendant explains the possession to the satisfaction of the jury" (United States vs. Llanes (2 Cir. 1967) 374 F.2d 712).

Where the issue is knowledge that the substance with which the appellant was performing a prohibited act was a narcotic drug, he can negate the inference, e.g., by explaining that he thought the substance was something else (United States vs. Llanes, supra). Johnnie states that he had been drinking quite a bit that afternoon and that about 4 P.M. he met a man whom he had known earlier in Los Angeles, California. He states that the man told him that if he would

take an object to a location in Los Angeles, California, the man would give Johnnie $150.00 when he arrived (RT 65). He states that he did not know for sure that he was smuggling and that if he had, he would not have done it (RT 75). He further testified that when he was a child he was hit by a truck and had amnesia for eight or nine weeks. He stated that he was in a coma all during that time and has occasional lapses of memory (RT 70). At no time did the prosecution ever attempt to establish that Johnnie knew that he was importing a narcotic drug into the United States. There is a total absence of proof that Johnnie had any knowledge that what was in the contraceptives was in fact heroin. Rather, the evidence establishes that he had been drinking, that he has lapses of memory resulting from a childhood accident, and that although he knew that he was bringing something across the border, he did not understand the purpose of his act. Therefore, it has not been established that Johnnie was doing such an act "fraudulently or knowingly." Nor has it been established that Johnnie had knowledge of the illegal imporation.

Apparently the government rests its entire case on possession of the drug by Johnnie. It is the government's position that the presumption arising from the final paragraph of section 174 is sufficient evidence as to all four elements of the crime because the narcotic drug was found on Johnnie's person. However, Johnnie has given an explanation for his acts.

5. The same test as to the four elements of the crime must be applied to Lonnie.

Lonnie did not, without the benefit of the presumption in the final paragraph of 21 U.S.C. 174, do a physical act set forth in the statute.

The evidence clearly shows that at the time the contraband was discovered, it was in the sole possession of Johnnie. It was physically attached to his body by a string. Although Johnnie's body was in the car, the immediate area of concealment of the contraband was the very muscles of Johnnie's arm.

The question as to whether the narcotic was illegally imported is discussed under parts 2 and 3 of the Argument in this brief, and the remaining two elements of the crime involve "knowledge."

On the crucial issue of knowledge, there must either be evidence of such knowledge, or evidence of possession to raise the presumption of the last paragraph of section 174 (United States vs. Llanes, supra). The only reasoning offered by the Court on this issue is a doubt that Johnnie would fail to tell Lonnie about the contraceptives attached to his arm. It is clear that the evidence is not sufficient as to Lonnie without reference to the presumption arising from possession. Therefore, Lonnie's conviction must rest upon evidence that Lonnie had possession of the narcotic drug.

A basic element of the offense of smuggling, indeed the sine qua non of it is possession in appellant. (See Ortez vs. United States (5 Cir. 1964) 329 F.2d 381.) Evidence of

intimate personal relationship does not infer guilt. Such evidence gives rise to a suspicion. But a suspicion, however strong, is not proof and will not serve in lieu of proof. (See Evans vs. United States (9 Cir. 1958) 257 F.2d 121.) When possession is solely in one person, circumstantial evidence is insufficient to show possession in another (Bass vs. United States (8 Cir. 1964) 326 F.2d 884).

Possession as used in 21 U.S.C.A. 174 means "dominion and control * * * so as to give power of disposal" (Rodella vs. United States (9 Cir. 1960) 287 F.2d 306, 311-312).

Mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support the finding of possession. (See Arellanes vs. United States (9 Cir. 1962) 302 F.2d 603, certiorari denied, 371 U.S. 930, 83 S.Ct. 294, 9 L.Ed.2d 238.)

Possession is attributed to Lonnie for the following reasons stated by Judge Copple in his decision (RT 136-8).

1. Appellants are "fairly close brothers who moved from Los Angeles to San Francisco and whether or not they lived at the same address, at least the evidence is clear that they saw each other every day."

2. In was, in the view of the Court, "fairly obvious that Lonnie is the stronger character and the leader of the two, the more intelligent of the two."

3. The appellants flew together from San Francisco to Los Angeles on the morning of February 11, 1967, and the

trip to Los Angeles was Lonnie's idea.

4. Lonnie paid the fare for both appellants to Los Angeles.

5. The Court concluded that they left Los Angeles for Tijuana within an hour of the time they arrived at Los Angeles.

6. Lonnie wanted to borrow an automobile and did so.

7. Lonnie wanted to go to Tijuana.

8. They went to Tijuana together.

9. They remained there most of the time together, although the Court concedes that they were probably separated from time to time because "the nature of their trip and their reasons for going to Tijuana and their activities there" so required.

10. They returned together.

11. It "stretches the credibility of the Court to believe that under all the circumstances, the relationship between the brothers, that he (Johnnie) would not have told his brother (Lonnie) about the $150 windfall and how he planned to get it."

12. The boys are intelligent.

Not one of the twelve pieces of conclusions relied upon by the Court is incriminating. There is an absolute lack of any evidence of any plan for the use of the heroin by the parties. Nor is there any conceivable design in which they both might fit for purposes of showing possession was

joint. Again, not one fact can be pointed to by the Court to show any connection between Lonnie Melvin Murray and Johnnie Charles Murray in regard to the heroin except that the Court does not believe that, being brothers, Johnnie would not tell Lonnie about the existence of the contraceptives attached to his arm. Such suspicion will not substitute for proof (Evans vs. United States (9 Cir. 1958) 257 F.2d 121).

This list of allegedly highly incriminating circumstances which support the conviction of Lonnie on the charge of smuggling heroin into the United States is to be compared with the decision of this Court in the cases of Orozco-Varquez vs. United States (9 Cir. 1965) 344 F.2d 827 and Arellanes vs. United States (9 Cir. 1962) 302 F.2d 603.

In the Orozco-Vasquez case, defendant Molano was convicted relating to one narcotics sale on one day on the following evidence:

> "(a) that Molano had been defendant Vasquez' boy friend for at least 3 or 4 weeks'; (b) one Esquivel made an appointment with Ramirez (no mentioned of Molano); (c) Molano arrived at Vasquez' home and watered the lawn; (d) Molano drove Vasquez and parked the auto within a block of where Vasquez contacted the stool pigeon Esquivel outside of Molano's presence; (e) that the auto, though traveling several blocks, was parked within fifty yards of Vasquez's house; (f) (no mentioned of Molano, except that Vasquez 'left' him); (g) Vasquez then returned and talked to Molano; (h) Vasquez left the car, delivered heroin, was paid and returned to Molano; (i) Molano and Vasquez drove fifty yards to Vasquez' home, Molano continued to water the lawn; (j) Vasquez never said she concealed what she was doing from Molano; (k) Vasquez testified falsely as to her conduct; (l) Vasquez' story as to why Molano waited for her in the auto was 'obviously false'; (m) the jury could have inferred Molano was a look-out;

(n) the jury could infer that Vasquez might have conferred with Molano with respect to narcotics.

"To pound the nail in the coffin of proof of Molano's alleged possession, the government informs us that Molano neither testified, nor called witnesses, on his own behalf!

"At best we know Molano on one day twice watered a guilty defendant's lawn and drove that same defendant (his girl friend) to and from an appointment where narcotics were sold, but in which sale he did not participate, and at which he was not present.

"There was never any proof Molano ever had any personal, actual possession of narcotics, nor constructive possession of them, nor knowledge of their presence in someone else's possession in the car he drove (if they were present). He never received, nor had even temporarily in his possession, any fruit of a sale.

"The government states this evidence summarized above, 'is more than sufficient to support the conviction of Molano.' We assume it is stated most favorably to the government. We have examined the record and find that it was thus most favorably presented as to Molano's guilt.

"We find no substantial evidence to support his conviction. We feel certain that had defendant Molano been the only defendant he would never have been convicted, and probably never prosecuted" (344 F.2d 829).

In the Arellanes case, this Court stated as follows:

"The evidence, viewed most strongly for the Government, establishes: (1) that Geneva Arellanes is married to Alfredo Arellanes; (2) that she stayed with him for a time at the apartment where the narcotics were subsequently found; (3) that she accompanied her husband on the trip and was with him in the car in which other narcotics were found; (4) that she made an idle reference to the narcotics in a remark to Mrs. Benton subsequent to the arrest and search and after disclosure of the marijuana in the car had been made to everyone present. On the basis of this, the Government states that

'Where the narcotics were, there also was Geneva Arellanes.' We cannot view this as a conclusively incriminating circumstance because the presence of the narcotics is also exactly coincidental with the presence of her husband, and Mrs. Arellanes' presence with both is as fully explained by her attachment to her husband as it might be by a control over the drugs. These facts might indeed to said to establish that that part of the charge related to the facilitation of transportation, but they cannot show the possession or control which the Government must establish to raise the presumption of guilty knowledge. There was, we point out, no showing here of the elements of joint venture, as in Eason vs. United States (9 Cir. 1960) 281 F.2d 818, 821."

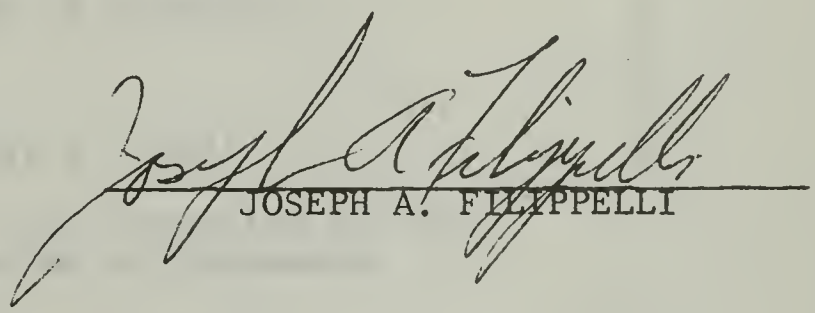
The peculiar manner in which the appellants went to Tijuana is set forth in the transcript of record. It is a matter of common knowledge that there is very regular, inexpensive, and expeditious air transportation between San Francisco, Los Angeles and San Diego. For an additional payment of less that $7.00, a person flying to Los Angeles may simply sit on the same airplane until he arrives in San Diego. At that point a person may go to Tijuana in any of several simple, inexpensive ways. However, it is assumed by the Court that the way in which two "intelligent boys" would plan a conspiracy to go to Tijuana for the purpose of smuggling heroin into the United States would be to fly to Los Angeles, borrow a Buick automobile at least twelve years old and drive to Tijuana.

At the time of sentencing, Judge Fred Kunzel commented on Judge Copple's decision as follows:

"* * * he just felt that it was improbable--highly probable--that Johnnie brought the contraband across and didn't appraise him (Lonnie) of what was happening (RT 3, July 31, 1967).

It is clear that there is no evidence to support a conclusion that Lonnie was in a joint venture with Johnnie. It was error for the judge to rely upon his feeling that Johnnie and Lonnie were such dependent sieblings that the action of Johnnie must include Lonnie. Such a feeling is not evidence, and can give rise to no more than a suspicion. And, a suspicion will not serve in lieu of proof. (See Evans vs. United States (9 Cir. 1958) 257 F.2d 121.) There is no proof of possession by Lonnie, and therefore his conviction should be reversed.

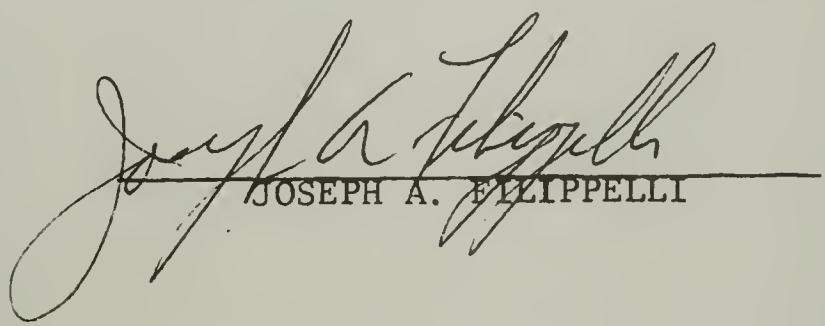
Respectfully submitted,



JOSEPH A. FILIPPELLI

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rule 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JOSEPH A. FILIPPELLI

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CERTIFICATE OF SERVICE BY MAIL

UNITED STATES)
)
COURT OF APPEALS) No. 22340
)
FOR THE NINTH CIRCUIT)

JOSEPH A. FILIPPELLI hereby certifies that he is an attorney admitted as an attorney and counselor of the United States Court of Appeals for the Ninth Circuit, and is a person of such age and discretion to be competent to serve papers.

That on April 11, 1968, he served a copy of the attached Appellants' Brief by placing said copy in an envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address and by depositing said envelope and contents in the United States mail at the Main Post Office Building, Seventh and Mission Streets, San Francisco, California.

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325 West "F" Street
San Diego, California

JOSEPH A. FILIPPELLI

OFFICIAL SEAL
MARY L. WOODSIDE
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN FRANCISCO COUNTY
My Commission Expires November 27, 1971

Subscribed and sworn to before me this 11th day of April, 1968.

Mary L. Woodside